

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406774

DAVID R. WILLIAMS,
EMPLOYEE

CLAIMANT

NABCO,
EMPLOYER

RESPONDENT

ACIG INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 14, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE STEVEN R. MCNEELY, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 22, 2005 in Little Rock, Arkansas. A prehearing order was entered in this case on January 28, 2005. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. The parties stipulate to the employee/employer relationship existing on June 16, 2004.

2. The parties stipulate that the claimant filed a claim for a back injury occurring on that date which was initially accepted as compensable.
3. The parties stipulate that the claimant earned an average weekly wage of \$736.86 which yields a temporary total disability rate of \$453.00 per week. (maximum rate)
4. The parties stipulate that the claimant was provided appropriate workers' compensation benefits until he was discharged by his authorized treating physician, Dr. Thomas Ward, on October 21, 2004.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Claimant's request for additional medical benefits (whether the treatment provided by Dr. Moody and Dr. Chan was unauthorized and whether their treatment was reasonably necessary for treatment of the claimant's admittedly compensable back injury).
2. TTD beginning October 22, 2004.

The record consists of the March 22, 2005 hearing transcript and the exhibits contained therein.

DISCUSSION**1. Admissibility of Form N**

The respondents raised a prehearing argument that the treatment at issue from Dr. Moody and Dr. Chan was unauthorized because this treatment was received after the claimant had received a change of physician from the Commission to Dr. Ward. During closing arguments, the claimant's attorney asserted that the change of physician rules do not apply in this case because the respondents did not place in the record a copy of any Form N signed by the claimant. In response, the respondents proffered a copy of the Form N. The claimant's attorney objected to the offer, and I determined to rule on the admissibility of the document when I rendered a decision on the claim.

For my part, I agree with the claimant that, as a general rule, proof of delivery of a Form N is a prerequisite to application of the change of physician rules as a bar to liability for unauthorized treatment. See generally Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). However, the Commission has concluded that, once a claimant actually petitions the Commission for a change of physician, delivery of the notice is not an issue. William M. Johnson v. Ranch Properties, Inc., Full

Workers' Compensation Commission, Opinion filed December 21, 1993 (E111447).

In the present case, the claimant's change of physician order and amended change of physician order from the Commission are in the record, and the original order explains that "This approval of a change of physician represents claimant's one time only change of physician...." Under these circumstances, I agree with the respondents' attorney that I fail to see the potential relevance of having a Form N in the record. In light of the novel nature of the claimant's closing argument asserting the potential relevance of a Form N, I find that the respondents' attorney should be excused from the 30 day document exchange provision in my prehearing order, and the proffered Form N is hereby accepted into the record.

2. Change of Physician/Authorization Issue

The respondents' attorney asserted in closing argument that the claimant was no longer authorized to treat with Dr. Moody after his change of physician to Dr. Ward by the Commission. I agree with the respondents that, as a general rule, treatment or services furnished or prescribed by unauthorized physicians shall be at the claimant's expense. See Ark. Code Ann. § 11-9-514 (C) (3) (Repl. 2002). However,

if a preponderance of the evidence establishes that the claimant's authorized treating physician refuses to see him again, and the respondents refuse to provide a new physician, then the change of physician rules do not apply after the claimant has been denied additional authorized medical treatment. See Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985); Bennett v. Earth Grains of Little Rock, Full Workers' Compensation Commission, Opinion filed March 17, 1997 (E317764); Sharon Lybrand v. Saline Nursing Center, Full Workers' Compensation Commission, Opinion filed October 23, 2002 (E908946).

In the present case, Mr. Williams was initially treated by Dr. Moody, his family physician and underwent a lumbar MRI on June 21, 2004. When Mr. Williams' complaints did not resolve, Mr. Williams was evaluated by a neurosurgical specialist, Dr. Schlesinger, on July 14, 2004. Dr. Schlesinger recorded Mr. Williams' symptoms as mostly low back pain, with some radiation into the left leg. After noting many possible etiologies for low back pain, Dr. Schlesinger indicated that he did not believe Mr. Williams was going to require any type of surgery, performed a lumbar epidural steroid injection on July 22, 2004, and ordered physical therapy. When Mr. Williams called in and reported

no relief from the injection or the therapy, Dr. Schlesinger released Mr. Williams from his care on August 4, 2004.

After the Commission entered a change of physician to Dr. Ward, Mr. Williams first presented to Dr. Ward on October 13, 2004 with an irregular back posture. Dr. Ward initially diagnosed Mr. Williams' postural abnormalities on October 13, 2004 as a symptomatic torsional dystonia associated with his back and lumbar spine. During his clinical examination, Dr. Ward recorded that Mr. Williams was experiencing back pain such that Mr. Williams got no relief from Diazepam and Oxycodone. Dr. Ward also recorded a history of pain radiating down into Mr. Williams' left leg past the knee and the left calf.

According to Dr. Ward's October 13, 2004 and October 21, 2004 reports, Dr. Ward on October 21, 2004 performed bilateral Marcaine chemo denervation injections into Mr. Williams' back muscles in anticipation of later performing Botulinum Toxin injection chemo denervation. Dr. Ward drew the following conclusions from the diagnostic and therapeutic injections:

Post Injection Findings: Mr. Williams had no benefit from his injections on this date. There has not been a single instance in which injections carried out of this variety has not assisted in a patient's pain. It can be therefore assumed that there can be no organic cause of his pain, and in fact after further observation the patient [sic]

noticed dramatic pain behavior which correlated highly with positive Waddell signs.

Conclusion: No organically identified injury and/or condition in which symptoms in the variety of injuries complained of by the patient can be substantiated. He is at maximum medical improvement. I do not have any explanation for her [sic] patient's complaints of pain, however, I can categorically indicate that there are no findings present on this date to substantiate his claim. He has been released back to work full duty.

There is no dispute in this case that the respondents were not going to pay for any more medical after Dr. Ward's release on October 21, 2004. (T. 26) Because the respondents controverted Mr. Williams' entitlement to any additional medical treatment effective October 21, 2004, I find that the change of physician rules do not apply to any treatment that Mr. Williams obtained after that date, and Mr. Williams was therefore free to obtain at the respondents' expense any additional reasonably necessary medical treatment from any physician of his own choosing.

3. Reasonable Necessity of the Disputed Treatment of Dr. Moody and Dr. Chan After October 21, 2004

The claimant must prove by a preponderance of the evidence that he is entitled to medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.3d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co.

v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

After Dr. Ward released Mr. Williams on October 21, 2004, Mr. Williams presented back to Dr. Moody on November 1, 2004. Dr. Moody apparently ordered a whole body bone scan performed on November 3, 2004. The bone scan did not indicate any abnormality in Mr. Williams' lumbar spine.

Mr. Williams presented to Dr. Patrick Chan, a neurosurgeon, on December 13, 2004 and on January 3, 2005 for low back pain and pain in the left leg. As I interpret Dr. Chan's December 13, 2004 report, Dr. Chan intended to obtain a new MRI of the lumbosacral spine and have Mr. Williams return ("in") after the MRI. I interpret Dr. Chan's January 3, 2005 report as referring to a "new MRI" which is not in the record. I interpret the three handwritten lines of Dr. Chan's Diagnosis and Recommendation on that date as stating in shorthand:

first line - "persistent left leg pain secondary to a left L5-S1 herniated nucleus pulposus"
second line - "plan- patient has failed nonoperative treatment"
third line - "patient most likely will need left L5-S1 decompression"

In light of the persistent nature of Mr. Williams' complaints, his persistence in obtaining additional medical after two physicians released him, and Dr. Chan's interpretation of a new MRI, I find that the claimant has

established by a preponderance of the evidence that the follow-up and bone scan by Dr. Moody, and the evaluation and MRI by Dr. Chan, obtained between November 1, 2004 and January 3, 2005, were reasonably necessary for Mr. Williams' work related back injury. In comparing the diagnosis of Dr. Chan to that of Dr. Ward, I note that Dr. Ward's reports and treatment protocol presumed that Mr. Williams did not have a disk injury based on Dr. Schlesinger's prior work up, and Dr. Ward diagnosed Mr. Williams with a condition (dystonia) which I have never heard of and which does not appear to me to be referenced a single time in the thousands of Full Commission opinions published since March 29, 1994. In comparing the diagnosis of Dr. Chan to that of Dr. Schlesinger, I note that Dr. Chan had the benefit of additional time and a second MRI as compared to Dr. Schlesinger.

With regard to future medical treatment, I again note that the claimant is at liberty to obtain additional reasonably necessary medical treatment from any physician of his own choosing. However, in light of the conflicting conclusions of Dr. Schlesinger and Dr. Ward versus Dr. Chan, I make no findings as to what additional treatment, if any, might be reasonably necessary for Mr. William's work related

injury. I note that any finding regarding the reasonable necessity of possible surgery would be premature at this time since (1) Dr. Chan has only stated that Mr. Williams "most likely" will need surgery, but has not actually proposed surgery and (2) the record does not indicate whether Dr. Chan has had the benefit of reviewing reports of Dr. Ward's and Dr. Schlesinger's treatment and conclusions regarding the work injury and their diagnostic testing.

4. Temporary Disability Compensation Beginning October 22, 2004

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present case, the claimant has failed to establish by a preponderance of the evidence in this record that he was incapacitated to earn after Dr. Ward released him to full duty work on October 21, 2004. In reaching that conclusion, I recognize that Dr. Moody released Mr. Williams

from work on November 1, 2004. However, the record is void of any indication that Dr. Moody knew of or considered the basis of Dr. Ward's diagnostic and functional conclusions made on October 21, 2004 when Dr. Ward released Mr. Williams to full duty. Clearly, Dr. Moody did not rely on a second MRI because that MRI had not yet been performed on November 1, 2004. Furthermore, I again stress the lack of any indication that Dr. Chan had available to him in December or 2004 and in January of 2005 the prior conclusions of Dr. Schlesinger and Dr. Ward, and I note that I do not see any specific reference in Dr. Chan's reports to releasing Mr. Williams from work. Absent any more persuasive subsequent evidence in the record, I accord greater weight to the October 21, 2004 observations and conclusions of Dr. Ward, a pain specialist, over the November 21, 2004 conclusions of Dr. Moody, a general practitioner, as to whether or not Mr. Williams' symptoms were so painful during the period so as to be incapacitating.

Therefore, for the reasons discussed herein, I find that the claimant has failed to establish by a preponderance of the evidence that he was incapacitated for any portion of the period beginning on October 22, 2004 and continuing through the date of the hearing held on March 22, 2005.

5. Controverted Attorney's Fees

Because Mr. Williams' injury occurred after the effective date of Act 1281 of 2001, I am without authority to award Mr. McNeely a controverted attorney's fee on the additional medical benefits awarded herein. See Ark. Code Ann. § 11-9-715(a)(2)(B).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties stipulate to the employee/employer relationship existing on June 16, 2004.

2. The parties stipulate that the claimant filed a claim for a back injury occurring on that date which was initially accepted as compensable.

3. The parties stipulate that the claimant earned an average weekly wage of \$736.86 which yields a temporary total disability rate of \$453.00 per week. (maximum rate)

4. The parties stipulate that the claimant was provided appropriate workers' compensation benefits until he was discharged by his authorized treating physician, Dr. Thomas Ward, on October 21, 2004.

5. The Form N proffered at the hearing by Ms. Demory has been accepted as evidence in the record, and has been considered in rendering a decision on this claim.

6. The respondents controverted the claimant's entitlement to any additional medical treatment effective October 21, 2004. Therefore, the change of physician rules do not apply to any additional medical treatment which the claimant received after October 21, 2004, or that he may receive in the future.

7. The claimant has proven by a preponderance of the evidence that the treatment he received from Dr. Moody and Dr. Chan between November 1, 2004 and January 3, 2005 was reasonably necessary for treatment of his compensable back injury.

8. Since Dr. Chan has not proposed a definite course of treatment as of January 3, 2005, I find that any conclusion as to what form of additional treatment might or might not be reasonably necessary for the claimant's compensable injury after January 3, 2005 is a premature issue as of the date of the hearing.

9. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional temporary disability compensation after October 21, 2004 through March 22, 2005. Specifically, the claimant has failed to prove by a preponderance of the credible evidence that he was incapacitated from earning during any period at issue after October 21, 2004.

10. I am without authority to award the claimant's attorney a controverted attorney's fee on the additional medical benefits awarded herein. See Ark. Code Ann. § 11-9-715(a)(2)(B).

ORDER

The respondents are liable and directed to pay for the additional medical treatment awarded herein.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge